IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

DONNA CRAIN,

Plaintiff,

vs.

LUCENT TECHNOLOGIES, INC., a Corporation,

Defendant.

NO. 96LM983

COMPLAINT

Comes now plaintiff, Donna Crain, and for her cause of action against defendant, Lucent Technologies, Inc., a Corporation, states as follows:

1. The plaintiff is a citizen and resident of Illinois and has paid to defendant rental charges for residential telephone equipment.

2. Defendant is a Delaware corporation providing consumers in the State of Illinois and Madison County residential telephone products through defendant's consumer lease program.

3. Plaintiff has been damaged by the contract-breaching practices of defendant as alleged herein.

4. Defendant purportedly contracted with plaintiff for the lease of residential telephone equipment without disclosing the material terms, conditions and limitations of the agreement.

5. After purportedly contracting with plaintiff, defendant breached its purported contract by increasing the promised fixed monthly rental price, by closing defendant's phone center stores located in Madison County and the State of Illinois, and by changing the terms of payment by requiring three months payable

in advance.

6. Defendant's breaches have resulted in confusion, inconvenience and unnecessary increase in costs to plaintiff.

WHEREFORE, plaintiff prays that the conduct of defendant be adjudged a breach of contract and that plaintiff be awarded actual and compensatory damages therefor, for an award of attorney's fees, cost of suit, pre- and post-judgment interest, and such other further relief as this Court deems necessary and proper.

STEPHEN M. TILLERY #2834995
412 Missouri Avenue
East St. Louis, IL 62201

ATTORNEY FOR PLAINTIFF

PLAINTIFF DEMANDS TRIAL BY JURY.

AFFIDAVIT

Comes now affiant, Stephen M. Tillery, attorney for plaintiff, and attests that the damages sought in this case is less than $50,000.00.

STEPHEN M. TILLERY

Subscribed and sworn to before me this 5th day of September, 1996.

Notary/Public

OFFICIAL SEAL
MARGARET DEATHERAGE
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXPIRES 02-13-97

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

DONNA CRAIN, et al.,
Plaintiffs,

vs.

LUCENT TECHNOLOGIES, ET AL.,
Defendants.

Case No. 96-LM-983

ORDER

This matter is before the Court on the DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, OR, ALTERNATIVELY TO DISMISS OR STAY. After the arguments of the attorneys were heard the matter was taken under advisement along with other motions that were taken under advisement. The Court has now considered the above Motion along with the defendants' Memorandum in Support of Defendants' Motion for Judgment on the Pleadings Under 735 ILCS 5/2-615(e), or Alternatively to Dismiss or Stay (including exhibits); Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings Under 735 ILCS 5/2-615(e), or Alternatively to Dismiss or Stay; Plaintiffs' Amended Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings Under 735 ILCS 5/2-615(e), or Alternatively to Dismiss or Stay (including exhibits); defendants' Reply Memorandum in Support of Motion for Judgment on Pleadings or , Alternatively to Stay or Dismiss, and the arguments of the attorneys along with the applicable law. The Court has also considered the supplemental memoranda of the parties regarding *AT&T v. Tenore*. Being fully advised in the premises, the Court finds as follows.

Although defendants' motion seeks judgment based on both preemption and the voluntary payment doctrine, the motion is to be disposed of on the basis of preemption. The

background of events concerning government regulation of the telecommunications industry as it pertains to residential customer premises equipment is set out in the pleadings and need not be repeated here. It is clear that the Federal Communications Commission conducted the Second Computer Inquiry and ultimately entered its Implementation Order pursuant to its lawful statutory authority. Through that process the FCC established duties on the part of entities such as defendants with regard to embedded customer premises equipment (CPE) during the transition period that implemented deregulation. Further, the pervasive undertaking of the FCC and its own orders strongly indicate that it intended to rely on the forces of the market to act as a regulatory tool in the future.

The first allegation of misconduct in paragraph 21 of the plaintiffs' Second Amended Complaint charges that the defendants collected unconscionably high rental charges for CPE. This is clearly an allegation of unreasonable rates. Other allegations are either tied to the question of reasonable rates or the failure to make appropriate disclosure concerning the cost and value of leased equipment, the customers' rights with respect to it and to continued telephone service. An examination of the Implementation Order and the other public records that are properly before the Court demonstrate that the plaintiffs' allegations fall within the contours of the concerns studied by the FCC and addressed in its Order to the extent it deemed appropriate. The defendants have complied with the requirements of the FCC. The duties that the plaintiffs would now impose on the defendants pertain to the same subject matter considered by the FCC and are inconsistent with the plan implemented by the FCC in its order and the subsequent regime of deregulation. Adjudication of the plaintiffs' claims would have this Court address the question of proper rates and require defendants to do things in addition to and different from the

things required by the FCC. The plaintiffs' claims are thus preempted by federal law and cannot be asserted in this action.

The plaintiffs urge that since their claims are based entirely on state law they are not preempted. The parties have not cited to any helpful case dealing with CPE and the cases cited by the plaintiff in opposition to the motion are to be distinguished on that ground. Plaintiffs rely heavily on *Kellerman v. MCI Telecommunications* (1986), 112 Ill.2d 428, 493 N.E.2d 1045. Although the *Kellerman* case held that the plaintiffs' state law-claims for fraud, breach of contract and deceptive practices were not preempted, the case involved subject matter and types of claims that are different from those involved in the instant case. The subject matter in that case was long distance service rather than CPE, and the claims in the plaintiffs' complaint involved "neither the quality of defendant's service nor the reasonableness and lawfulness of its rates. Plaintiffs only allege that defendant disseminated fraudulent and deceptive advertisements concerning the cost if its long-distance service." 112 Ill.2d at 443. The practices complained of by the *Kellerman* plaintiffs consisted of defendant's false claims concerning its rates as compared to a competitor's rates and failing to disclose that certain charges were being made. In this case, unlike *Kellerman*, the plaintiffs do directly challenge the reasonableness of defendant's rates ("unconscionably high rental charges"). The remaining allegations in the instant case are of a different character than those in *Kellerman* and, as noted above, are either related to the reasonableness of rates or with the failure to make adequate disclosures regarding the leasing of CPE. The FCC has already addressed the appropriate notices and disclosures to be given by providers with respect to CPE. Moreover, because the state-law claims asserted by the plaintiffs are inconsistent with the regulatory scheme established by the FCC, they are not salvaged by the savings clause found in 47 U.S.C. 414. The plaintiffs are not without a remedy. If they are

aggrieved by the allegedly unfair charges and practices of the defendants, they have a cause action in federal court or with the FCC pursuant to 47 U.S.C. 207.

For the reasons outlined above and for all the reasons set out in the defendants' pleadings and memoranda, the defendants' MOTION FOR JUDGMENT ON THE PLEADINGS, OR, ALTERNATIVELY TO DISMISS OR STAY is hereby allowed on grounds of federal preemption. Judgment is entered in favor of the defendants pursuant to 735 ILCS 5/2-615(e). All other pending motions are denied as moot.

Clerk to send copies of this Order to all attorneys of record.

DATE: March 10, 1999

P. J. O'Neill
Circuit Judge

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

DONNA CRAIN, CHARLES SPARKS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

LUCENT TECHNOLOGIES, INC. and AT&T CORPORATION,

Defendants.

Cause No. 96-LM-983

PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S MARCH 10, 1999, ORDER

COME NOW plaintiffs, by their undersigned counsel, and in support of their request that the Court reconsider its Order entered March 10, 1999, granting Defendants' Motion for Judgment on the Pleadings, or, Alternatively to Dismiss or Stay, and for their Motion to Reconsider, state as follows:

1. To find that a federal agency has preempted state law, the agency must either have *expressly* preempted state law or the court must find that there is an irreconcilable conflict between the agency's regulation and the state law in question. *City of New York v. FCC*, 486 U.S. 57, 64, 108 S.Ct. 1637, 1642, 100 L.Ed.2d 48 (1988). Within the meaning of the preemption doctrine, such a conflict would arise in the CPE context only if: 1) it would be "impossible" for a CPE provider to comply both with now-expired FCC regulations regarding the provision of CPE and with state consumer protection and contract laws, or 2) if state consumer protection or contract laws stand as an obstacle to the FCC's objective–specifically, the objective of ensuring a competitive CPE market. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995).

2. As this Court itself seems to have implicitly and correctly concluded, the FCC has never *expressly* preempted state consumer protection or contract law. March 10, 1999, Order at 2 (FCC's orders "indicate" preemption, rather than *expressly* preempt). Without question, the FCC expressly preempted state "tariff-type regulation" or "rate regulation" of CPE. As the FCC itself repeatedly explained in its CPE detariffing orders, "a fundamental objective" of the *Second Computer Inquiry* "is the promotion of a competitive CPE marketplace through the ***elimination of rate regulation***." *Notice of Proposed Rulemaking*, 94 F.C.C.2d 76, ¶ 20 (1983). On the other hand, the FCC never expressed any intention whatsoever to preempt state consumer protection and contract laws; indeed, it has expressly declined to preempt state contract law with regard to CPE and has referred CPE customers to *state consumer protection agencies* for resolution of their CPE-related complaints. Clearly, there is no *express* FCC preemption of state consumer protection and contract laws.

3. Moreover, there simply is no "impossibility" of compliance with state and federal requirements. Preemptive "impossibility" arises only when complying with state law necessarily means violating the federal requirement. *Myrick*, 514 U.S. at 287, 115 S.Ct. at 1487 ("We have found implied conflict preemption where it is 'impossible for a private party to comply with both state and federal requirements.'") Given the fact that the only FCC "regulations" that could conceivably give rise to such "impossibility" expired more than ten years ago, on January 1, 1986, (the end of the two-year transition period to a detariffed CPE market), there simply is no "impossibility" of compliance that would preempt state consumer protection and contract laws. *Myrick*, 514 U.S. 289, 115 S.Ct. 1488 ("it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard for a private party to comply with").

4. Similarly, state consumer protection and contract laws do not stand as an obstacle of the FCC's objective of a competitive CPE market. Indeed, in 1985 *at AT&T's urging*, the FCC expressly declined to preempt state contract law with regard to CPE leases. In 1996 and 1997, the FCC referred CPE customers to *state consumer protection agencies* for resolution of their CPE-related complaints. Clearly, the FCC itself does not regard state consumer protection and contract laws as an obstacle to the FCC's goal of a competitive CPE market.

5. Given the FCC's explicit refusal to preempt state contract law with respect to CPE leases, this Court erred in dismissing plaintiffs' restitution and breach of contract claims (Counts II and III).

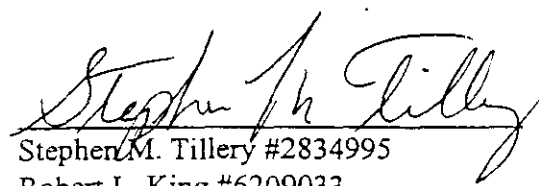
6. Finally, the Court erred in holding that plaintiffs have a remedy under section 207 of the Communications Act is wrong for two distinct reasons: 1) as part of the detariffing proceedings, the FCC expressly held that the provision of CPE was no longer a "communication service," which necessarily means that a section 207 claim will not lie for CPE-related practices; and 2) Lucent is not now and never has been a "common carrier subject to the provisions of" Title II of the Communications Act–yet only such "common carriers" are proper defendants to a section 207 proceeding.

7. By granting defendants' motion, particularly with respect to Lucent (and technically with respect to AT&T as well), the Court has effectively treated defendants' motion as one for summary judgment without requiring either defendant to demonstrate that there is no genuine issue of material fact as to its "carrier" status within the meaning of the Communications Act–a burden that Lucent cannot possibly carry because it has never been such a "carrier."

WHEREFORE, for reasons more fully explained in plaintiffs' memorandum accompanying this motion, plaintiffs request that the Court vacate its March 10, 1999, Order and reinstate plaintiffs' claims, or alternatively, vacate its March 10, 1999, Order, reinstate plaintiffs claims and refer the preemption issue to the FCC for resolution, and for such further relief as the Court deems just and reasonable.

Respectfully submitted,

CARR, KOREIN, TILLERY, KUNIN,
MONTROY, CATES & GLASS



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